INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 68

THE UNITED STATES, PETITIONER

v.

BLOEDEL DONOVAN LUMBER MILLS, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on December 1, 1947.

OPINION BELOW

The majority and dissenting opinions of the Court of Claims (R. 18-50) are reported at 74 F. Supp. 470.

JURISDICTION

The judgment of the Court of Claims was entered on December 1, 1947 (R. 50). A motion for new trial, seasonably filed, was denied on March 1, 1948 (R. 50). The jurisdiction of this Court is invoked under the provisions of Section 3(b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether, under the standard slash disposal provisions of a government timber sales agreement, the United States contracts to reimburse a contractor for damages caused him by the negligence of the government officers in directing the setting of slash fires.

2. Whether, assuming that the United States has so contracted, the instant claim is, nevertheless, one "sounding in tort" over which the Court of Claims lacks jurisdiction.[1]

CONTRACT PROVISIONS INVOLVED

The applicable contract provisions are set forth in Appendix B, *infra,* pp. 25-27.

STATEMENT

Briefly summarized, the findings of the Court of Claims follow:

By two substantially identical timber sales agreements dated March 9, and April 8, 1940, respondent Bloedel Donovan Lumber Mills agreed to purchase, cut and remove certain standing timber owned by the United States and growing on two separate tracts of land of 14 and 80 acres respectively, in the Olympic National Forest in the western part of the State of Washington (R. 18-19). In accordance with the practice established for the pro-

[1] A subsidiary question presented is whether in the circumstances, as found below, the damage to respondent's property on September 21, 1942, located on land four miles beyond the area covered by the burning plan, was a foreseeable result of the negligence of the government officers in directing that the slash fires be set on September 11, 1942.

tection of the forest and other property in the vicinity of logging operations, paragraph 16 of each contract provided for the controlled burning of the slash [2] in order substantially to reduce the hazard of uncontrolled or accidental fire (R. 20). Respondent there agreed "to burn such of the slash resulting from this sale as the Forest Supervisor may require, at such times and in such manner as the Forest Officer in charge shall specify" (R. 20).

Paragraph 16 further provides:

> * * * For this purpose, the purchaser [*i. e.* respondent] agrees to furnish a sufficient number of men not exceeding 30 without cost to the Government; *Provided,* That the purchaser shall not be held responsible for damage to the United States resulting from fires started to dispose of slash, if such fires were set at times and places specified by the Forest Officer in charge, and if all the precautions required by him were taken.
>
> If required, slash from winter logging shall be burned in the following spring, and slash from summer logging shall be burned in the following fall, and in no instance shall slash burning be postponed except when weather conditions, or other adequate reason, makes slash burning impracticable in the judgment of the Forest Officer, when it may be postponed in writing until conditions are more favorable.

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[2] The term slash is understood in the logging industry as referring to branches, tops and other material removed from the trees in the production of logs (R. 20).

> The purchaser shall so plan his logging operations and make such arrangements for the protection or removal of logging equipment as may be necessary so that slash can be burned periodically when required by the Forest Officer. (R. 20-21.)

Both contracts originally required that all cutting be completed by December 31, 1940, but were extended at respondent's request to December 31, 1941 (R. 19). All the timber was in fact cut and removed from the areas covered by the two contracts by September 9, 1941 (R. 19).

As a result of these operations, large accumulations of unburned slash were left in the cut-over areas (R. 21). In addition, there was substantial unburned slash in other areas in the same general vicinity (R. 21). Under the direction of Forest Ranger S. M. Floe, one of the Government's authorized representatives for the administration and enforcement of the contracts here involved, a detailed plan for the burning of slash was formulated and agreed to by respondent on September 19, 1941 (R. 21-22). The plan, referring to Paragraph 16 of the timber sales agreements (Appendix B, *infra* pp. 25-27), and Section 218 of the Forestry Laws of Washington,[3] related not only to burning of the

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[3] Section 218 (Remington's Wash. Rev. Stat. 1932, Supp. Sec. 5807) declares that the inflammable debris created by logging, which is likely to further the spread of fire, constitutes a fire hazard and imposes the burden of abating the hazard on those responsible for its creation. It further provides that upon the latter's failure to abate the hazard, the state supervisor of forestry may summarily

slash on 76 acres of the areas covered by the two contracts here involved but also to the burning of the slash on 337 acres of privately-owned contiguous land, which respondent had also cut over (R. 21-22). The slash in this area (Calawah area) was continuous and was considered as a unit in the firing plan (R. 22). The slash did not dry out sufficiently to permit burning in 1941 (R. 22). In December 1941, respondent applied for further extensions of the contracts until December 31, 1942, for the sole purpose, all timber cutting having been completed, to enable it to discharge its slash burning obligations (R. 19-20). The requested extensions were granted (R. 19).

Before drying weather commenced in the spring of 1942, the Washington Forest Defense Council banned the burning of slash in western Washington (R. 23). The ban was lifted on September 9, 1942 (R. 23). By that time[4] there were accumulated

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cause the hazard to be abated, with the costs thereof to be borne by the responsible party.

Under Sections 5784 and 5787 of the Washington law (Remington's Wash. Rev. Stat. 1932), rangers and assistant rangers of the United States Forest Service may be appointed *ex officio* rangers in the Washington forestry service. Correlatively, government forest rangers are authorized to accept appointments without compensation as deputy state fire wardens, 36 C. F. R. 211.3. During 1942, the various government forest rangers here involved were officially appointed rangers in the Washington Department of Conservation and Development (R. 23).

[4] September is normally, and has always been considered, the best month for disposing of slash in that locality. If the slash is dry enough to burn in early September, delay may render burning impossible until the following year, because once the slash becomes wet at that time of the year, it does not dry sufficiently to permit burning. On the other hand, imminence of fall rains in September reduces the hazards of the fire getting beyond control.

in that general vicinity, from 1800 to 2000 acres of unburned slash including the slash under the contracts here involved (R. 23). On Tuesday, September 8, the day previous to the lifting of the ban, a five-day extended weather forecast predicted "showers beginning of period to midweek further showers coastal areas near end of week" (R. 28). No daily forecast showing a change in that prediction came to the attention of the government representatives prior to noon Friday, September 11 (R. 29).

On September 10, Miller, the Assistant Forest Supervisor, and Ranger Floe saw respondent's logging manager, Donovan, for the purpose of getting him to agree that slash burning be commenced the next day (R. 24). Both Miller and Floe, expecting rain in the immediate future (R. 24), were anxious that the slash be burnt in the next day or two since they believed that otherwise the slash would not be burned that year, and that if that happened the continuing accumulation of unburned slash would increase the mounting fire hazard (R. 24). They took to this meeting the 1941 Calawah plan and two similar plans covering other areas in the same general vicinity, which had also been cut over by respondent (R. 24). There was some government-owned land included in one of these areas, the Bear Creek area; the other area consisted solely of privately-owned land (R. 24). Donovan agreed to the execution of the plans, com-

mencing on the next day, upon the condition that Wood, respondent's woods superintendent, also gave his approval (R. 24). Later that day, when Miller and Floe asked Wood to arrange for burning slash at Calawah and Bear Creek the next morning, Wood agreed without protest to burning at Bear Creek (R. 24). He initially objected to burning at Calawah on the ground that he did not think it advisable to burn at that time,[5] but, upon urging, agreed to furnish crews of eight men each to commence burning in each area, provided he first could get permission from Donovan directly (R. 24).

When Floe arrived at Wood's office on the morning of September 11, Wood, who had been unable to get in touch with Donovan (R. 24-25), had provided only one crew of eight men, intended for the Bear Creek operation (R. 24). The weather conditions did not appear favorable to him, and he did not want to take responsibility for the burning at Calawah without orders from Donovan (R. 25). Floe became indignant at Wood's failure to honor his agreement of the night before (R. 25). After a heated discussion, Floe started to depart, informing Wood that as far as he was concerned, unless both areas were burned as planned, no burning at

[5] Floe testified that Wood stated, as another reason for not wanting to burn slash at Calawah, that he did not want to cut down the logging crews, that he wanted as far as possible to keep logging going so that the Bellingham Mill would not have to shut down (R. 24). Judge Madden, in his dissenting opinion, points out that the climatic conditions at Bear Creek and Calawah were the same (R. 48).

all would be undertaken that year (R. 25). As Floe was getting into his car to return to the ranger station, Wood called him back and agreed to send a crew to Calawah (R. 25). The eight-man crew was split into two crews of four men with a foreman in charge of each; one crew was sent to Calawah, and the other to Bear Creek (R. 25, 30).

The fire at Calawah was set about noon on September 11[6] on private lands about four miles northeast of the so-called "Burma Road" area in accordance with the plan (R. 30). The government lands included were in that part of the area to be burned which was furthest from the Burma Road (Exhibit G, Exhibit R. fol. p. 48). Respondent's timber and equipment, which was ultimately destroyed and which gave rise to this proceeding, was located in the Burma Road, where respondent was cutting timber with men and logging equipment (R. 32). The Burma Road was about three to four miles southwest of the area intended to be burned, and was separated therefrom by more than two miles of old slash caused by timber cutting

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[6] At 10:45 a. m. on September 11, the Weather Bureau issued a special fire weather forecast which read:

> Clear to scattered clouds rising temperature lower humidity fuel moisture light to gentle easterly winds becoming moderate tonight.

This forecast did not reach Floe until the following day. If he had received it before the fires were started, he would have postponed starting the fire but only until the immediately succeeding days. The court found that the evidence does not establish that the ultimate damage to respondent's property would have been avoided had Floe received this special forecast in time to postpone the setting of the fires (R. 29-30).

in 1927 and 1928, and a stretch of approximately one mile of green timber (R. 32-33).

The fire burned satisfactorily for four or five days with four to six of respondent's men controlling it (R. 30-31). Each night, Floe received reports on the fire's progress and he and Wood, who was in charge for respondent, made plans for the next day as to the placement of men (R. 31). By September 15, the fire had completely consumed all slash included in the burning plan, and was still three miles from the Burma Road (R. 31). On that day, a pump was made available, the operation of which required the efforts of the five or six men whom respondent had made available (R. 31). Up to this time, the fire could have been stopped from spreading, with a larger number of men (R. 32).

On September 16, the fire had backed down around the edge of an old railroad grade, which had acted as a fire line protecting the area lying between the Burma Road and the area covered by the burning plan, and was creeping into the old slash area not intended to be burned (R. 32). Floe, in order to stop the spread of the fire, sought to use a substantial trench left from earlier logging operations as the basis of a fire line, and respondent, on September 17, furnished 35 men to establish the line (R. 32). Most of respondent's men and fire fighting equipment were from that day until September 20 engaged in controlling the further spread of the

fire (R. 32). By September 20, the fire was checked and respondent and the forest officers felt that the situation was in pretty good shape (R. 32). On the morning of September 21, respondent's crew and equipment went back to cutting logs in the Burma Road, which at that time was still more than a mile away from the nearest fire in the old slash area (R. 32-33).

About noon of September 21, however, the temperature rose, the humidity dropped very suddenly and dangerously, and the wind began to blow (R. 33). In the afternoon, a strong dry wind rose, blowing in a direction from the old slash area toward respondent's operations (R. 33). By evening, the wind fanned some smouldering embers into a blaze, and carried sparks and burning embers for a distance of a mile across the intervening stand of green timber (R. 33). Spot fires broke out in the Burma Road (P. 33). Respondent's available forces were called into action and succeeded in controlling the fire after 2 or 3 days, but only after a large amount of respondent's equipment and cut timber was damaged or destroyed (R. 33). Quenching rains started on September 30 and put out the fire (R. 33). The actual ground fire itself from the old slash area did not at any time reach the Burma Road. When the fires were finally extinguished, there was still an unburned plot of ground a mile or more between the two areas (Exhibit G, Exhibit R, fol. p. 408).

The Court of Claims held, after hearing reargument,[7] that Paragraph 16 of the timber sales agreements implied an obligation on the part of the United States to use due care in specifying a time when the slash should be burned (R. 40). Violation of that obligation, the court held, made the United States liable for such damage as might reasonably have been foreseen as the natural and probable consequence thereof and claims arising therefrom "being connected with and growing out of a contract is within the jurisdiction of this court" (R. 40). The court found that the government officers had been negligent in ordering the slash fires started on September 11, that this was a breach of the contracts, and that the damage to respondent's property in the Burma Road on September 21, 10 days later, was the natural probable consequence of this negligence (R. 40, 46). Accordingly, it entered judgment for respondent in the amount of $70,798.46 for such damage (R. 50). Judges Madden and Littleton dissented. In their opinion, the setting of the fire was a joint venture and not the act of the Government, inasmuch as the vast percentage of the land included in the burning plan was nongovernment land (R. 47). They point out that as to that land, the government officers had no authority whatever, and the respondent was free to burn or not to burn the slash as it desired

[7] Upon the initial argument, the court divided two to two. When Judge Howell was appointed, reargument was ordered, and the present three to two division resulted.

(R. 47-48). They also dissented on the further ground that the ultimate damage on September 21 on land four miles beyond the area covered by the burning plan was not a foreseeable consequence from the setting of the fire on September 11 (R. 49).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that under Paragraph 16 of the timber sales agreements, the United States contracts to exercise due care in directing the setting of slash fires and to reimburse the contractor for damages suffered by him as the result of a breach of that obligation.

2. In holding that that obligation extends to the present situation.

3. In failing to hold that the government officers had no authority to require the burning of slash on the nongovernment land included in the burning plan.

4. In failing to hold that respondent had complete discretion and control over the burning of slash on the nongovernment land.

5. In holding that respondent did not freely and voluntarily acquiesce in the setting of the slash fires.

6. In holding that respondent's claim is one sounding in contract and not in tort and therefore within the jurisdiction of the court.

7. In holding that the damage to respondent's property on September 21, 1942, was the foreseeable consequence of the setting of the slash fires on September 11, 1942.

8. In entering judgment for respondent.

REASONS FOR GRANTING THE WRIT

1. The questions raised by the present case are of general importance meriting review by this Court. Paragraph 16 has, as the result of long usage, become virtually a standard form provision in timber sales agreements. It has always been understood and construed by the Forest Service, the agency of the Government concerned with these agreements, not to impose any liability on the United States for damages suffered by the contractor as the result of slash fires set at direction of a government forest ranger.[8] The contrary holding below not only runs counter to this uniform

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[8] The Government believes that when the situation is viewed prospectively at the time the fires were set, and not by the exercise of hindsight, the finding below that the government officers were negligent in directing the setting of slash fires on September 11 (R. 46) is contrary to the facts as proved in that court. September is the normal month for the burning of slash in western Washington. Heavy rains were needed ultimately to put out the fires and the government officers, on the basis of their fifteen years of experience in that vicinity, anticipated that these rains would come reasonably soon. The fact that September 1942 turned out to be the driest September in that vicinity in many years accounts in some measure for what happened, but does not make the action of the government's representatives negligent. Moreover, at the time the fires were set, the substantial accumulation of slash in the general vicinity, constituted a serious fire hazard threatening the remaining timber in the area. This threat of uncontrolled conflagration had to be weighed against the possibilities of damage resulting from the

construction but in so doing operates to impose great potential and unanticipated liabilities on the Government. For while Paragraph 16 can be modified as to future contracts, the United States would, under the decision below, be liable for such damages on expired contracts on which the period of limitations has not run, as well as for similar damages arising out of the contracts still in effect. The Forest Service estimates, based on the facts that it enters into approximately 2100 agreements containing this paragraph each year and that these agreements typically ran for more than one year, that there are in effect at present about 5000 of these contracts, some of which have 10 or 15 years to run. See Appendix A, *infra*, pp. 23-24. Under each of these contracts, slash burning is required, and, in each instance, there is a possibility, because of the uncertainty of weather forecasting, that the fire will get out of control, thereby opening the way under the theory below for an action against the Government for negligence in directing the setting of the fire. The threat of such potential liability would, moreover, seriously deter the taking of calculated risks by government officers exercising the discretion vested in them by Paragraph 16 to direct

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setting of controlled fires. All these considerations indicate that while the fires may not have been set under ideal conditions, the situation on which the respondent's witnesses and the court below on its findings (R. 25-28, 44-46) focused their attention, the setting of the fires at the time specified by the government officers was in the circumstances not negligent. However, despite our belief that the findings below on this point are demonstrably erroneous, the Government accepts them for the purposes of this petition in order to avoid burdening this Court with voluminous evidence relevant to that issue.

that slash fires be set under other than ideal conditions. Such reluctance would operate to increase the risk of accidental fires and result in incalculable damage to the Nation's timberlands.

Review of the decision below is important from other aspects as well. The extension of the implied obligation to use due care to include slash burning on even nongovernment land, although the government officers involved were not authorized to assume such obligation on behalf of the United States, is another instance of the tendency recently manifested by the Court of Claims to impose liability on the United States for the unauthorized acts of its agents. The Court of Claims recently imposed such liability on the Government, in *Paretta* v. *United States,* No. 46395, decided October 6, 1947, certiorari denied, No. 482, this Term (February 9, 1948); *Winn-Senter Construction Co.* v. *United States,* No. 45999, decided January 5, 1948; cf. *Cox* v. *United States,* 73 F. Supp. 1022 (C. Cls.). The cumulative effect of these holdings so departing from this established and important principle will, if not corrected, be to whittle down and eventually to destroy that basic principle so far as the Court of Claims is concerned and, *pro tanto,* to subject the Government to unauthorized liabilities.[9]

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[9] As we have indicated, *supra,* note 1, p. 2, if a writ of certiorari is granted, the Government wishes also to urge that the holding below, that in the circumstances here involved the ultimate damage on September 21 was the reasonable and probable consequence of setting the fires on September 11, constituted error. Cf. *Stephens* v. *Mutual Lumber Co.,* 103 Wash. 1; *Lehman* v. *Maryott & Spencer Logging Co.,* 108 Wash. 319.

2. The finding below of an implied obligation on the United States to reimburse respondent for its damages resulting from the negligent directions of the government representatives as to the setting of slash fires violates the established principle, that, as stated by Mr. Justice Holmes "A liability in any case is not to be imposed upon a government without clear words." *Pine Hill Coal Co.* v. *United States,* 259 U. S. 191, 196; cf. *United States* v. *Algoma Lumber Co.,* 305 U. S. 415, 421; *Farm Security Administration* v. *Herren,* 165 F. 2d 554, 562-563 (C.C.A. 8), certiorari denied, No. 662, this Term (April 19, 1948). Moreover, the provisions of Paragraph 16 itself rebut the existence of such an obligation. The holding below fails to give proper weight to that language of Paragraph 16 providing that respondent is not to be responsible for damage resulting to property of the United States from the burning of slash if it complies with the conditions prescribed by the forest officer. This provision clearly places the primary responsibility for the burning, and for any damages resulting therefrom, upon respondent. For plainly underlying this express provision is the assumption that liability for damages caused by slash fires is normally to be borne by respondent and that an express provision was necessary to relieve respondent of liability to the United States when it complies with all conditions imposed by the Government.

The Department of Agriculture advises that for more than forty years, timber sales contracts have contained substantially the slash burning provisions here involved. During that period, slash fires set under the supervision of the government officers have got out of control and caused extensive damage. Until the present case, the Government has not reimbursed the contractor for such damage, nor has any claim been made or action instituted against the United States for recovery therefor. Indeed, in all such instances, not only has the contractor himself borne the loss, but he has also reimbursed the Government for the cost of labor and equipment supplied by the Government to fight the conflagration (Appendix A, *infra*, pp. 23-24). This experience reveals a practical construction of Paragraph 16 completely opposed to the holding below, a practical construction which, we submit, is entitled to great weight in determining the meaning of Paragraph 16. Cf. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315; *United States* v. *American Trucking Ass'ns., Inc.*, 310 U. S. 534, 539; *Adams* v. *United States*, 319 U. S. 312, 314-315; *Edward's Lessee* v. *Darby*, 12 Wheat. 206, 210.

3. Even if it be assumed that the United States did undertake to be liable for damages, that obligation, we submit, extended only to the burning of slash on the land covered by the timber sales agreements. There is nothing in the findings below to

support the extension by that court of the obligation to include slash burning on the 337 acres of nongovernment land also included in the burning plan. As to that land, the government officers, as such, clearly had no authority under the contracts to require the setting of the slash fires—a fact which, as Judge Madden in his dissenting opinion points out, the respondent knew (R. 47). Nor were the obligations of United States extended to include this land by the slash disposal plan, for there is nothing in the plan itself to indicate that there was any intention to impose this additional obligation on the United States, or that the government officers had any authority so to increase the Government's obligations. As a matter of fact, these officers clearly had no such authority. See Forest Service Reg. S-15, 36 C.F.R. 221.15.

Conversely, respondent owed no contractual obligation to the United States to burn the slash on this non-government land and the Government's representatives as such could not have compelled respondent to burn it. Respondent, however, did have the obligation and the sole responsibility, under Washington law, to abate the fire hazard caused by the existence of slash, which it had created by cutting over the timber. See Remington's Rev. Stat., Wash. 1932, Supp. § 5807; *Great Northern Ry. Co.* v. *Oakley,* 135 Wash. 279. This obligation involved not only the setting of the fires but watching over them as well. *Stephens* v. *Mutual Lumber*

Co., 103 Wash. 1; *Sandberg* v. *Cavanaugh Timber Co.*, 95 Wash. 556; *Lehman* v. *Maryott & Spencer Logging Co.*, 108 Wash. 319.[10] And, as Judge Madden points out (R. 48), respondent could have refused to accede to the setting of the slash fires if it had been unwilling to start the fires at the time and place set by the government officers.[11]

In these circumstances, the actions of government officers in negligently directing that the slash fires be started pursuant to the overall plan for the burning of slash on nongovernment as well as government-owned land—and, indeed, the fires were first started on nongovernment rather than government land—were beyond the scope of their authority under the contracts, and hence do not operate to impose any obligation therefor on the United States. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U. S. 380, 384; *Filor* v. *United States*, 9 Wall. 45; *Whiteside* v. *United States*, 93 U. S. 247; *United States* v. *North American Co.*, 253 U. S. 330. Moreover, of the 443 acres included in the burning plan, the 76 acres of government land were furthest away from the Burma Road and consisted of two

[10] In the instant case, respondent furnished only four or five men to aid in the control of the slash fires. Paragraph 16 provided that he was to furnish a sufficient number of men not exceeding 30 without cost to the Government, and the Court below found that up until September 17, the fire could have been stopped from spreading with a larger number of men (R. 32).

[11] In view of these considerations, the finding below that respondent did not freely and voluntarily agree to the burning so as not to be responsible for any of the consequences (R. 41-43) is without foundation. Cf. *Galbraith* v. *Wheeler-Osgood Co.*, 123 Wash. 229; *Wood & Iverson, Inc.* v. *Northwest Lum. Co.*, 138 Wash. 203.

small plots of land, the larger of which containing 60 acres was cut off from the Burma Road by a ridge (Exhibit G, Exhibit R. fol. p. 48). Accordingly, a fire restricted to the Government land would in all probability have been easier to control with the manpower available, and would have been less likely to spread to the area from which it suddenly jumped to the Burma Road.

Since the burning plan covered both government and nongovernment land, and respondent had complete discretion over the 337 acres of nongovernment land, Judge Madden construed the execution of the plan as a joint venture. As so construed, it follows that notwithstanding the contrary finding below (R. 4-43), the decision to set the slash fires was not the act solely of the Government but one in which respondent freely and voluntarily participated. Hence the negligence in setting the fires was as attributable to respondent as to the United States. Respondent accordingly should be required to bear at least as much responsibility for the setting of the fires as the United States, and should not be permitted to look to the United States for reimbursement for the resulting damages to it. *Illinois Central R. R. Co.* v. *United States,* 16 C. Cls. 312, 332; *Bates* v. *Tirk,* 177 Wash. 286; *Frisorger* v. *Shepse,* 251 Mich. 121; *McQuiston* v. *Shreveport Rys. Co.,* 12 La. App. 277.

4. Since the burning plan pertained to 337 acres of non-government land, over which the govern-

ment officers had no authority under the contracts here involved, their requirement that the slash fires be set was not, contrary to the court below (R. 40), connected with, nor did it grow out of, the contracts. For this reason, respondent's claim being based on the negligent actions of the government officers sounds in tort, rather than contract, and hence is beyond the jurisdiction of the Court of Claims to hear and enter judgment against the United States. Cf. *Schillinger* v. *United States,* 155 U. S. 163; *Bigby* v. *United States,* 188 U. S. 400; *Tempel* v. *United States,* 248 U. S. 121; *Pearson* v. *United States,* 267 U. S. 423.

The tortious nature of this proceeding is further demonstrated by the fact that Paragraph 16 cannot be stretched to impose a contractual duty of due care to all of respondent's property no matter where located. Respondent's property not located on the land covered by the timber sales agreement was no different from the property of third parties similarly located. And if the property damaged had belonged to a third party, there would have been no breach of a contractual obligation to exercise due care, on which to base a suit in the Court of Claims. It follows that the damage to respondent's property located off the land covered by the contracts did not stem from a breach of contract.[12]

[12] The error in this phase of the case is not merely a jurisdictional one; it permits the allowance of recovery where none appears permissible, since it is extremely doubtful whether the claim here in-

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1948.

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volved is cognizable under the Federal Tort Claims Act (Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, 28 U. S. C. 921, *et seq.*). As shown in the text, the Government's representatives, as such, had no authority over the nongovernment land included in the burning plan, and hence the setting of the slash fires on this land did not occur while they were acting within the scope of their office or employment. Section 410, 28 U. S. C. 931. Moreover, the determination of when and under what conditions to set the fires, even as related to the government land involved, constituted the exercise of a discretionary function or duty on the part of these representatives within the express exemption of Section 421(a) of the Act (28 U. S. C. 943). In any case, the fires here involved and the resulting damage occurred in September 1942, whereas the Act allows suits only on claims accruing on and after January 1, 1945. Section 410, *supra*.

APPENDIX A

United States Department of Agriculture
Office of the Solicitor
Washington, D. C.
May 21, 1948

Honorable Philip B. Perlman
Solicitor General of the United States
Department of Justice
Washington, D. C.

Dear Sir:

Pursuant to an oral request from your office, this letter will summarize information obtained from the records of the Forest Service of this Department with respect to the background of the claim involved in the case of *Bloedel Donovan Lumber Mills* v. *United States,* Court of Claims No. 46118.

Timber sale contracts of the Forest Service have contained provisions for slash disposal substantially similar to those in suit for 40 years or more. In recent years there has been an annual average of 2,100 sales, from forests in the West, under contracts including such provisions. Since a large proportion of the contracts run for periods in excess of one year, and, in some cases, for 10 to 15 years, there would be outstanding at any given date from two to three times the number of timber sale contracts made in any one year.

Extensive damage has resulted from the spread of fires started by timber purchasers on national forest land pursuant to slash disposal provisions of timber sale contracts similar to those in suit. In each instance the private operator has paid all

fire fighting expenses and has reimbursed the Government for the cost of labor and equipment supplied by the Forest Service for fire fighting purposes. Heretofore no claim has been made or suit brought against the United States for damages resulting from the spread of slash fires which were set in compliance with the provisions of any contract.

This Department is gravely concerned by the effect of the decision in this case upon the interest of the United States under thousands of timber sale contracts containing a slash burning clause substantially similar to that here involved. That clause, as interpreted by the Court of Claims in this case, would appear to make the Government responsible to its timber purchasers for damages resulting from their own slash burning operations on sale areas where the forest officers act negligently or pursuant to honest but erroneous judgment in supervising such operations for the purpose of protecting the interests of the United States. The financial burden to the Government would be enormous.

Sincerely yours, JAMES A. DOYLE,
Associate Solicitor.

By direction of the Secretary

APPENDIX B

Pertinent contract provisions are as follows:

Period of Contract.—3. Unless extension of time is granted, all timber shall be cut and removed and the requirements of this agreement satisfied on or before December 31, 1940.

10. As far as practicable all branches of logging shall keep pace with one another, and in no instance shall slash disposal be allowed to fall behind cutting, except when the depth of snow or other adequate reason makes proper disposal impracticable, when the disposal of slash may, with the written consent of the Forest Officer in charge, be postponed until conditions are more favorable.

Slash Disposal.—16. Slash shall be disposed of as follows: The purchaser agrees to burn such of the slash resulting from this sale as the Forest Supervisor may require, at such times and in such manner as the Forest Officer in charge shall specify. For this purpose, the purchaser agrees to furnish a sufficient number of men not exceeding 30 without cost to the government: *Provided,* That the purchaser shall not be held responsible for damage to the United States resulting from fires started to dispose of slash, if such fires were set at times and places specified by the Forest Officer in charge, and if all the precautions required by him were taken.

Slash Burning.—If required, slash from winter logging shall be burned in the following spring, and slash from summer logging shall be burned in the following fall, and in no instance shall slash burning be postponed except when weather con-

ditions, or other adequate reason, makes slash burning impracticable in the judgment of the Forest Officer, when it may be postponed in writing until conditions are more favorable.

The purchaser shall so plan his logging operations and make such arrangements for the protection or removal of logging equipment as may be necessary so that slash can be burned periodically when required by the Forest Officer.

Fire Lines.—16a. Where necessary in the judgment of the Forest Officer in charge, for the control of slash fires and the protection of any areas on or adjacent to the sale area, fire lines shall be constructed by the purchaser, provided that not over one mile of line may be required on the entire area covered by this agreement. On such fire lines, which shall be constructed under the direction of the Forest Officer in charge and shall not be required to be over 20 feet in width, all designated living trees and all dead trees shall be felled and inflammable material, including slash, reproduction and debris, shall be piled and burned by the purchaser if practicable in the judgment of the Forest Officer in charge.

Where deemed necessary in the judgment of the Forest Officer in charge, a strip not to exceed 3 feet in width cut to mineral soil shall be cleared on the exterior edge of the fire lines. The fire lines shall be completed as to any unit of the cut-over area, as required by the Forest Officer. Where creeks are used as fire lines, logs, slash and debris, sufficient to cause a fire danger shall be removed and the channels so used.

29. The term "officer in charge," wherever used in this agreement, signifies the officer of the Forest Service who shall be designated by the proper supervisor to supervise the timber operations in this sale.

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No. 68

In the Supreme Court of the United States

OCTOBER TERM, 1947

THE UNITED STATES, PETITIONER,

vs.

BLOEDEL-DONOVAN LUMBER MILLS, a corporation,
RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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STATEMENT OF THE CASE

In 1940 respondent, Bloedel Donovan Lumber Mills, a corporation, entered into two written contracts with the petitioner, the United States, whereby the respondent agreed to cut and remove from two certain parcels of land owned by petitioner, located in the Olympic National Forest in the western part of the State of Washington, certain standing timber and to pay petitioner therefore at the rates specified in the contracts. The contracts further provided (paragraph 16, Exhibits Transcript page 8, that the respondent "agrees to burn such of the slash resulting from this sale as the forest supervisor may require at such times and in such manner as the forest officer in charge shall specify * * *."

On September 10, 1942, in the late afternoon, the superintendent of the respondent at Sappho, Washing-

ton, received a peremptory demand from the duly authorized officers of the government to set fire to and burn the slash resulting from said contract beginning the following morning at eight a.m. The superintendent objected, upon the ground that such an operation under the conditions then prevailing was highly dangerous. The officers of the government insisted. An argument ensued. Ultimately the superintendent yielded and on the following morning a crew of men was placed at the disposal of the government officers who proceeded to set the slash fire. The superintendent's fears appeared to have been only too well grounded, the fire got out of control, and inflicted substantial damage upon respondent.

Respondent thereupon brought suit against petitioner in the Court of Claims alleging in substance, briefly, that it had entered into said contracts with petitioner, that it was an implied condition of said contract that the authority vested in petitioner to determine whether said slash should be burned and if so, the time and manner thereof would be exercised with due care and skill. That the officers of the petitioner failed to exercise due care and skill in determining the time and manner of said burning of said slash and that the damage sustained by respondent was a direct result of their failure so to do.

Trial before the Court of Claims resulted in findings and judgment of that court sustaining the allegations of respondent's petition and awarding judgment in the favor of respondent in the sum of $70,798.46. The evidence before the Court of Claims has not been

brought up and no claim is made here that the findings are contrary to the evidence or that they are not supported by substantial evidence.

Petitioner in this court now asks Certiorari. It states the questions which it desires to present as follows:

> "1. Whether, under the standard slash disposal provisions of a government timber sales agreement, the United States contracts to reimburse a contractor for damages caused him by the negligence of the government officers in directing the setting of slash fires.
>
> "2. Whether, assuming that the United States has so contracted, the instant claim is, nevertheless, one 'sounding in tort' over which the Court of Claims lacks jurisdiction.[1]

> "[1]A subsidiary question presented is whether in the circumstances, as found below, the damages to respondent's property on September 21, 1942, located on land four miles beyond the area covered by the burning plan, was a foreseeable result of the negligence of the government officers in directing that the slash fires be set on September 11, 1942." (Petition, page 2)

It bases its claim to review by Certiorari upon the ground that (page 13 of Petition) "The questions raised by the present case are of general importance meriting review by this court."

We address ourselves first to this question of

GENERAL INFORMATION

There is nothing in the record of the case itself to indicate any general importance to be attached to the

issues presented. The issues presented before the Court of Claims were largely factual. Their occurrence again in the same form seems improbable.

The claim of general importance of the questions presented appears to be predicated entirely upon certain statements contained in a letter from the Honorable James A. Doyle, Associate Solicitor of the Department of Agriculture to the Solicitor General, a copy of which letter is attached to the petition on page 23 as Appendix A. This letter is certainly, legally at least, a mere unsworn self-servicing declaration as to the accuracy of which, respondent manifestly has no means of getting any detailed information. Respondent implies no criticism direct or indirect of the author of the letter.

As respondent analyzes this letter, it furnishes no basis whatsoever for any claim that the questions presented by this case are of such general importance as to justify issuance of a Writ of Certiorari. If the letter is examined, it will be observed that it is not stated in the letter that there is pending at the present time either in any court or in the department itself, any claim whatsoever, the decision of which would in any manner be affected by the decision rendered by the Court of Claims in this case. In fact, the letter expressly states to the contrary saying that prior to the date thereof, May 21, 1948, "No claim has been made or suit brought against the United States for damages resulting from the spread of slash fires which were set in compliance with the provisions of the contract." Nor does the letter claim that the department has any

knowledge of any specific facts or any specific situation or situations which would seem to indicate a threat of any such claim or suit or the possibility, let alone the probability, that any suits of a similar character may be brought in the future. It is stated in the letter that there are numerous other contracts containing "A clause *substantially* similar to that here involved." Presumably the clauses in these contracts as to wording vary. Whether the variation is of any moment cannot be determined from the letter.

In the petition and in the letter, it is stated that during the last forty years other slash fires set under the supervision of the government officers have gotten out of control and caused extensive damage and that the government had not reimbursed the contractor for such damage in any case. As to how many such occurrences there have been in the forty-year period, there is no statement — not even a general statement that they have been numerous. There is of course no statement either in the letter or the petition that any of these fires have been caused by the negligence or misconduct of the employees of the department nor is there any statement that any claim has been made in any case except the instant one that the fires were so caused.

The principal ground upon which a review is sought appears to be the claim of the petitioner that the claim of respondent sounds in tort and that the government was therefore immune from suit thereon. It would seem that as to claims originating after Jan. 1, 1945 (the effective date of the Federal Tort Claims Act)

this defense, if available at all to petitioner (which we do not believe it is) would be no longer available so that the scope of this decision as affecting the Department of Agriculture would appear to be limited to claims, if any, arising prior to January 1, 1945, and which possessed a sufficient similarity upon the facts to make the rule in the case now before the court apply. Such claims must have come into existence prior to January 1, 1945. If there were such, it seems probable at least that they should by this time have come to light. That there exist any such claims is not even suggested. The suggestion that the issues presented by this case present any real question of public importance is, we submit, a pure figment of the imagination.

ARGUMENT

The petition is not accompanied by a separate brief nor is their contained in the petition any division of it which is formally designated as "Brief." The petition does contain, beginning on page 16, some arguments and the citation of some cases which respondent assumes were intended by petitioner as a brief. The argument takes quite a wide range and argues quite a number of different matters, which respondent will endeavor to discuss herein.

If respondent catches petitioner's position correctly and respondent is frankly not certain that it does, the principal question that petitioner desires to raise is that the claim of respondent rests in tort and is not within the jurisdiction of the Court of Claims. This

question the lower court disposed of in its decision (Transcript 40) as follows:

> "The contracts expressly provided that plaintiff burn slash 'at such times and in such manner' as the forest officer in charge should specify. This implied an obligation on the part of defendant to use due care in specifying a time when the slash must be burned. If defendant's forest officer failed to exercise due care in specifying a time to burn, and if, as a result, the burning damaged plaintiff's property, defendant would be liable for such damage as might reasonably have been foreseen as the natural probable consequence of his action. This action being connected with and growing out of a contract is within the jurisdiction of this court. *Dooley v. United States*, 182 U.S. 222, 228; *United States v. Spearin*, 248 U.S. 132; *Moore v. United States*, 46C. Cls. 139, 173; *Chippewa Indians v. United States*, 91C. Cls. 97, 130, 131; *Deterding v. United States*, 107 C. Cls. 656, 661; *Heil v. United States*, 273 Fed. 729, 731."

It is submitted that the cases cited above amply sustain the position of the court. To the same general effect, in addition are in this court, *United States v. Bostick*, 94 U.S. 53, and more recently *Keifer and Keifer v. R.F.C.*, 306 U.S. 381, 391. The rule was enunciated in the Court of Claims as early as *Moore v. United States*, 46 Court of Claims 139, where the court said (page 172):

> "What is the responsibility of the Government where its engineer in charge actively directs work to be done in a certain manner which proves defective and causes great loss to the contractor

> and where the exercise of ordinary care could have foreseen such defects?"

After a detailed discussion of the matter, the court concluded (page 174):

> "We believe the rule in cases of this character to be that where a contractor constructs a work under a contract which provides that it shall be done under the direction and supervision of an engineer appointed by and under the employ of the owner [Government] and loss occurs to such contractor by reason of the defects in the plans directed to be followed by such engineer of a character which ordinary skill would have foreseen, the owner [Government] should pay for such loss."

Petitioner cites in support of its position: *Schillinger v. United States*, 155 U.S. 163; *Bigby v. United States*, 188 U.S. 400; *Tempel v. United States*, 248 U.S. 121; *Pearson v. United States*, 267 U.S. 423, but in none of these cases, as the court in each of them specifically pointed out, was there any contractural relationship with the United States. In the instant case the liability arises out of the acts of petitioner pursuant to its contract. It was the existence of the contract which made it possible for petitioner's officers to perform those acts. Had there been no contract, respondent would have sustained no loss.

The petitioner comments at some length upon the proposition that two members of the court dissented. We have no disposition at this point to argue the merits of the dissenting opinions, but in connection therewith it should be noted that neither of the judges

expressed any doubt as to the court's jurisdiction. Their dissent was limited to two propositions and to two propositions only. First, the dissenting opinion seems to hold that the petitioner and the respondent were engaged in a "joint-venture." It is most respectfully submitted that there is not the slightest element of "joint-venture" in the relationship existing between the parties. If this contract was a joint-venture, then very contract by the terms which A agrees to build a house for B and B agrees to pay for it, is a joint-venture. Certainly the parties are both interested in the result, but that, by no means, constitutes the same, a joint-venture.

The second ground of the dissent is "that the damages sustained were "not the foreseeable result" of the action of the government's officers." This is purely a question of fact, a question which was resolved against the petitioner by the decision of the majority. The correctness of the decision of the majority upon both of these issues is not challenged by the petitioner here.

Some contention appears to be made that the officers of the United States acted in excess of their authority, but this would appear to present a question of fact, or at best, a mixed question of fact and law which has been resolved against the petitioner by the decision of the court below upon the facts.

Lest the matter be not completely understood, let us briefly call attention to the physical situation presented out of which this claim of the petitioner arises. The two tracts covered by the two separate contracts

with petitioner were not contiguous. Between them lay other slash. It was an inevitable physical result that if any of this slash was set on fire, all of it would burn. The officers of the petitioner in preparing plans for burning the slash, naturally and properly took this fact into account. Their plans covered the contingency that all of the slash would burn which was true not as a matter of law, but as a matter of inevitable physical fact. Petitioner argues that the only authority the officers of the United States had was in respect to the burning of the slash upon the ground covered by the contracts. It seems almost self-evident that the grant to the United States of the power to require the slash upon the land covered by the contracts to be burned by necessary implication carries a grant of a right to burn slash on adjacent property if that was indespensible or reasonably necessary to the proper burning of the slash on the property covered by the contracts. To construe the contract as petitioner now attempts to do, as limiting the right of the petitioner to have the slash burned to the setting of a fire or fires which would only burn the slash on the property actually covered by the contract would be to construe the right to have the slash burned completely out of the contract because as a physical proposition such a construction could not be performed. There is no finding and there was in fact, no evidence that it was practicable, to attempt to burn only the slash located on the ground covered by the government's contract, or that if such an attempt had been made it would have changed the result in any degree. The claim of petitioner that the officers were acting be-

yond the scope of their authority was tenuous at best. It was resolved against them on the facts by the lower court.

The lower court held on voluminous evidence that the officers of the petitioner were guilty of serious misconduct in actions performed within the scope of their authority and that respondent's loss was the direct result thereof. The evidence upon that decision is not brought to this court and the correctness of the decision of the lower court upon those questions are neither challenged here nor is it open to challenge here, nor is it within the scope of the questions which the court is by the petition requesting to review.

In conclusion, the respondent desires to call attention to the fact that in no place in the record is it claimed that the result arrived at was unfair or unjust or that the petitioner by the decision of the court will be compelled to pay a claim which it does not justly and fairly owe. The damage to respondent was real, its extent and amount was not disputed by petitioner. It is most respectfully submitted that the application for the writ should be denied.

Respectfully submitted,

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